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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES ROGER WAGNER,

Defendant and Appellant.

E049563

(Super.Ct.Nos. FSBSS055114 &  
A885566\*)

OPINION

APPEAL from the Superior Court of San Bernardino and Los Angeles Counties.

Kyle S. Brodie, and Loren Miller, Jr., Judges.<sup>1</sup> Reversed with directions.

Thomas A. Loya for Defendant and Appellant.

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\* Kyle S. Brodie, Judge of the Superior Court of San Bernardino County, denied defendant's motion to have his mandatory sex offender registration requirement terminated on the ground it violates his right to equal protection. Judge Loren Miller, Jr., of the Superior Court of Los Angeles County, sentenced defendant on October 6, 1987, and ordered him to register as a sex offender for life.

<sup>1</sup> Judge Loren Miller, Jr., is a retired judge of the Superior Court of Los Angeles County, assigned by the Chief Justice. (Cal. Const. art. VI, § 6.)

Edmund G. Brown, Jr., Attorney General, Marissa Bejarano, Deputy Attorney General, for Plaintiff and Respondent.

In 1987, defendant and appellant James Roger Wagner pled nolo contendere to oral copulation involving an adult over 21 years old and a child under 16 years old. (Pen. Code, § 288a, subd. (b)(2).)<sup>2</sup> A trial court placed him on probation for three years, and he was ordered to spend the first year in county jail. He was also ordered to register as a sex offender for life under the Sex Offender Registration Act. (§ 290 et seq.) Defendant successfully completed his probation and requested the court to expunge his conviction pursuant to section 1203.4, which the court did. He later filed a motion to have his mandatory sex offender registration requirement terminated (the motion). The court heard the motion and denied it.

On appeal, defendant contends that the order requiring him to register as a sex offender violates his right to equal protection. The People correctly concede. We reverse the order and remand the matter to the trial court to allow the court to exercise its discretion and determine whether defendant must continue to register as a sex offender.

### PROCEDURAL BACKGROUND

Defendant filed a motion for relief from his sex offender registration requirement, arguing that, under *People v. Hofsheier* (2006) 37 Cal.4th 1185 (*Hofsheier*), his mandatory lifetime sex offender registration requirement violated the equal protection clause. In *Hofsheier*, the California Supreme Court held that the mandatory lifetime sex

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<sup>2</sup> All further statutory references are to the Penal Code unless otherwise indicated.

offender registration requirement of former section 290, subdivision (a)(1)(A), violated the equal protection clause to the extent it required mandatory registration for oral copulation with a 16-year-old girl (§ 288a, subd. (b)(1)) but not for unlawful sexual intercourse with a girl of the same age (§ 261.5). (*Hofsheier*, at pp. 1206-1207.) The Supreme Court explained that persons convicted of the two offenses were similarly situated, and there were no rational grounds for treating them differently. (See *People v. Garcia* (2008) 161 Cal.App.4th 475, 481 (*Garcia*), overruled on another ground by *People v. Picklesimer* (2010) 48 Cal.4th 330, 338, fn. 4 (*Picklesimer*).) The Supreme Court concluded that “where mandatory registration violates the equal protection clause, the proper remedy is to hold a hearing to determine whether the defendant should be subject to discretionary registration as a sex offender under former subdivision (a)(2)(E) of section 290. [Citation.]” (*Garcia*, at pp. 478-479; see also *Hofsheier*, at pp. 1208-1209.) *Garcia* extended *Hofsheier*’s reasoning and holding to convictions for oral copulation with a person under 16, in violation of section 288a, subdivision (b)(2). (*Garcia*, at pp. 481-482.)

In response to defendant’s motion, the prosecution relied on *People v. Manchel* (2008) 163 Cal.App.4th 1108 (*Manchel*), overruled on another ground by *Picklesimer*, *supra*, 48 Cal.4th at p. 338, footnote 4. In *Manchel*, the victim was under the age of 16, and the defendant was more than 10 years older. (*Manchel*, at p. 1110.) The court held that because the defendant’s sexual conduct fell within statutes that provide for mandatory registration, such as committing a lewd act under section 288, subdivision (c)(1), he could not establish that he was similarly situated to another group of offenders

who were not subject to mandatory sex offender registration. (*Manchel*, at p. 1115.) Thus, the order requiring him to register as a sex offender did not violate the equal protection clause. (*Ibid.*) The prosecution in the instant case argued that the trial court should follow *Manchel*. The court agreed and denied defendant's motion, determining that defendant must continue to register as a sex offender.

## ANALYSIS

### Defendant's Mandatory Sex Offender Registration Requirement

#### Violates the Equal Protection Clause

Defendant argues that the court erred in denying his motion and, specifically, in basing its denial on *Manchel*, *supra*, 163 Cal.App.4th 1108. He contends that the court should have granted his motion, pursuant to *Hofsheier*, *supra*, 37 Cal.4th 1185 and *Garcia*, *supra*, 161 Cal.App.4th 475. The People concede.

#### *Defendant's Right to Equal Protection Has Been Violated*

Defendant contends that subjecting him to lifetime mandatory sex offender registration because his conduct constituted a lewd and lascivious act on a child in violation of section 288, but without ever convicting him of that offense, is a denial of due process and equal protection. He also argues that, in determining whether he was similarly situated to persons not required to register, the court must look at the crime of which he was convicted, not the underlying conduct. We agree.

Here, defendant was convicted of oral copulation of a person under 16, in violation of section 288a, subdivision (b)(2), thus, subjecting him to mandatory registration. (§ 290.) However, a person convicted of unlawful sexual intercourse with a

person under 16 (§ 261.5), is only subject to discretionary registration under section 290.006. Both section 288, subdivision (b)(1), and section 261.5 concern sexual conduct with minors. The only difference between the two offenses is the nature of the sexual act. Thus, persons convicted of the two offenses are similarly situated, under an equal protection analysis. (*Hofsheier, supra*, 37 Cal.4th at pp. 1200, 1207; *Garcia, supra*, 161 Cal.App.4th at pp. 481-482.)

Furthermore, we note that *Manchel*'s holding has been rejected by courts for its faulty logic. (E.g., *People v. Ranscht* (2009) 173 Cal.App.4th 1369, 1373-1374.) *Manchel* "would have us completely ignore the crime of which a defendant is convicted and look instead to all of the crimes of which a defendant *could have* been convicted based on his conduct. This holding overlooks *Hofsheier*'s plain language, which focused on 'persons who are *convicted* of voluntary oral copulation, . . . as opposed to those who are *convicted* of voluntary intercourse with adolescents in [the] same age group.' [Citation.] [¶] Consistent with *Hofsheier*, we think the more appropriate course is to focus on the offense of which the defendant was *convicted*, as opposed to a hypothetical offense of which the defendant *could have* been convicted based on the conduct underlying the charge. 'This approach jibes with the mandatory registration statutes themselves, which are triggered by certain convictions, . . . and not by the underlying conduct of those offenses per se.' [Citations.]" (*Ranscht*, at pp. 1374-1375.)

For these reasons, we reject the reasoning of *Manchel* and conclude that subjecting defendant to mandatory sex offender registration violated his equal protection rights. This matter must be remanded to the trial court to conduct a new hearing to determine

whether the defendant must continue to register as a sex offender. (*Picklesimer, supra*, 48 Cal.4th at pp. 336-341, 343; see also *Lewis v. Superior Court* (2008) 169 Cal.App.4th 70, 77.)

#### DISPOSITION

The order of the trial court imposing mandatory sex offender registration on defendant under section 290, subdivision (c), is reversed. The matter is remanded for the trial court to exercise its discretion to determine whether to require defendant to register as a sex offender under section 290.006.

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HOLLENHORST  
Acting P.J.

We concur:

McKINSTER  
J.

KING  
J.